No. 141

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

HARVEY EASTMAN, CHARLES STROM, OSCAR MCLEOD, ALFRED EDWARD BECKEN, LAYTON HENRY WILLIAMS, JAMES JACKSON, *et al.*, *Petitioners*,

vs.

UNITED STATES OF AMERICA, RAYMOND H. BITNEY, Superintendent of Taholah Indian Agency, and JAMES A. HOWARTH, JR., United States Forest Supervisor, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

W. A. ACKERMAN,
403 Becker Building,
Aberdeen, Washington.

OTTO B. RUFF,
ALFRED J. SCHWEPPE,
657 Colman Building,
Seattle, Washington.

Counsel for Petitioners.

No.....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

HARVEY EASTMAN, CHARLES STROM, OSCAR MCLEOD, ALFRED EDWARD BECKEN, LAYTON HENRY WILLIAMS, JAMES JACKSON, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA, RAYMOND H. BITNEY, Superintendent of Taholah Indian Agency, and JAMES A. HOWARTH, JR., United States Forest Supervisor,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

W. A. ACKERMAN,
403 Becker Building,
Aberdeen, Washington.

OTTO B. RUPP,

ALFRED J. SCHWEPPE,
657 Colman Building,
Seattle, Washington.

Counsel for Petitioners.

THE ARGUS PRESS, SEATTLE

SUBJECT INDEX

	Page
Petition for a Writ of Certiorari	1
Summary statement of the matter involved	1
Questions presented	3
Reasons relied on for the allowance of the writ	6
Prayer for writ	13
Brief in Support of Petition for Writ of Certiorari	15
I. The opinion of the court below	15
II. Jurisdiction	15
III. Statement of the case	19
IV. Specification of errors	24
V. Argument	26
Point A	26
Point B	27
Point C	32
Conclusion	33

TABLE OF CASES CITED

Berdie v. Kurtz, 75 F. (2d) 898	33
British American Oil Co. v. Board, 299 U.S. 159	12, 32
Brooks v. Dewar (U. S. Sup. Ct.) May 26, 1941	33
Cate v. Beasley, 299 U.S. 30	12, 32
Chippewa Indians v. U. S., 301 U.S. 358	7, 11, 27, 30
Choate v. Trapp, 224 U.S. 665	12, 32
Creek Nation v. U. S., 302 U.S. 620	12, 32
Colorado v. Toll, 268 U.S. 228	33
Eastman v. U. S., 118 F. (2d) 421	2, 9, 15, 17, 24
Eastman v. U. S., 28 F. Supp. 807	2
Eastman v. U. S., 31 F. Supp. 754	10, 24, 29
Halbert v. U. S., 283 U.S. 753	8, 19, 28
Jones v. Meehan, 175 U.S. 1	12,31, 32
Klamath & Modoc Tribes v. U. S., 296 U.S. 244	12, 32
Minnesota v. U. S., 305 U.S. 382	12, 32
Missouri v. Holland, 252 U.S. 416	33

Page

Portmouth Co. v. U. S., 260 U.S. 327.....11, 30
Shoshone Tribe v. U. S., 299 U.S. 476.....12, 32
U. S. v. Algoma Lumber Co., 305 U.S. 415..6, 12, 26, 32
U. S. v. Klamath Indians, 304 U.S. 119.....11, 30
U. S. v. McGowan, 302 U.S. 535.....12, 19, 32
U. S. v. Nez Perce County, 95 F. (2d) 232..... 31
U. S. v. Payne, 264 U.S. 446.....11, 31, 32
U. S. v. Powers, 305 U.S. 527.....12, 19, 32
U. S. v. Seminole Nation, 299 U.S. 417.....12, 32
U. S. v. Shoshone Tribe, 304 U.S. 111.....6, 12, 27,32
U. S. v. United States Fidelity & G. Co., 309 U. S. 506 .....12, 19, 32

STATUTES, TREATIES AND REGULATIONS CITED

Act of March 1, 1907 (34 Stat. 1018; 25 U. S. C. § 405, § 407) 10, 28
Act of June 25, 1910, §§ 7 and 8 (36 Stat. 855, 857; 25 U.S.C. §§ 407 and 406).....
.....3, 4, 5, 6, 8, 9, 10, 16, 17, 22, 24, 25, 28
Act of February 14, 1920 (41 Stat. 415; 25 U.S.C. § 413) 5, 11,18, 31
Fifth Amendment.....3, 4, 11, 17, 23, 25
General Forest Regulations of 1920, §10..4, 17, 21, 22, 25
General Forest Regulations of 1920, Reg. 50....5, 21, 23
General Forest Regulations of 1936, Reg. 22.....
.....4, 17, 21, 22, 25
General Forest Regulations of 1936, Reg. 19.....5, 23
General Forest Regulations, April 23, 1936..... 21
Indian Service General Timber Sale Regulations (1920) 21
Judicial Code § 240(a) amended (28 U.S.C. §347) 19
Revised Statutes, §2079 (Act of March 3, 1871; 16 Stat. 566; 25 U.S.C. §71)....3, 5, 17, 18, 23, 25, 26, 30
Treaty with the Omahas, Art. VI (10 Stat. 1043, 1044) 7, 24, 27
Treaty with the Quinaielts of 1855 (12 Stat. 971) 3, 4, 7, 11, 16, 17, 18, 22, 23, 24, 26, 27, 30, 31

In the Supreme Court of the United States

OCTOBER TERM, 1940

HARVEY EASTMAN, CHARLES STROM, OSCAR MCLEOD, ALFRED EDWARD BECKEN, LAYTON HENRY WILLIAMS, JAMES JACKSON, *et al.*, *Petitioners*,

vs.

UNITED STATES OF AMERICA, RAYMOND H. BITNEY, Superintendent of Taholah Indian Agency, and JAMES A. HOWARTH, JR., United States Forest Supervisor, *Respondents*.

No.....

PETITION FOR WRIT OF CERTIORARI

May it Please the Court:

The petition of Harvey Eastman, Charles Strom, Oscar McLeod, Alfred Edward Becken, Layton Henry Williams, James Jackson, *et al.*, respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The petitioners are Quinaielt Indians, owning trust allotted lands in the Quinaielt Indian Reservation in the State of Washington. The petitioners brought ~~in the sale and logging of the timber on their allotted~~ this suit, as allottees of lands, on behalf of themselves and all other allottees similarly situated.

The petitioners, in their complaint (R. 83) in the

District Court, sought a declaration that the Indians have authority to dispose of the timber on their allotments, and that regulations of the Secretary of the Interior, made in 1920 and 1936, which sought to regulate the sales of timber on Indian lands, are illegal and void. Petitioners prayed an injunction restraining interference by the defendants with the Indians lands in the Quinaielt Indian Reservation.

The District Court denied the defendants' motion to dismiss (R. 77; 28 F. Supp. 807), and later decided the cause on the merits in favor of the complainant Indians, holding the regulations sought to be enforced by the defendants invalid, and that the petitioners were suffering substantial and immediate detriment and irreparable injury in that enforcement of the regulations deprived the allottees of the right conferred by Congress to sell their timber, and illegally withheld as much as 25% to 60% of their timber from sale (R. 159, 178) for scenic, aesthetic, recreational, roadside beautifying, seeding, second cutting, and similar purposes (R. 169-171, 175). The trial court therefore enjoined the enforcement of these regulations and any interference with the logging operations that the Indians might desire to have carried on under sales contracts entered into by them (R. 150, 185; 31 F. Supp. 754).

The foregoing decision of the trial court was reversed by the Circuit Court of Appeals for the Ninth Circuit (R. 1040; 118 F. (2d) 421). This decision of the Circuit Court of Appeals the Indian petitioners earnestly seek to review here upon the following questions:

in the sale and logging of the timber on their allotted

Questions Presented

1. In the light of the Treaty with the Quinaielts of 1855 (12 Stat. 971), and of Revised Statutes, Section 2079 (Act of March 3, 1871; 16 Stat. 566; 25 U.S.C. §71), providing that no Indian treaty made prior to 1871 shall be invalidated or impaired, and of the Fifth Amendment providing for due process of law and that private property shall not be taken for a public use without just compensation, and of Sections 7 and 8 of the Act of June 25, 1910 (36 Stat. 855, 857; 25 U.S.C. §§ 407 and 406), providing for the sale of timber on unallotted lands "under regulations to be prescribed by the Secretary of the Interior," and providing that timber on allotted lands may be sold *by the Indian allottee* "with the consent of the Secretary of Interior," who is given power to make regulations governing the payment of the proceeds to the allottee, does the Secretary of the Interior have the power, in connection with and after giving his consent to the sale of timber, by members of the Quinaielt Indian Tribe, on *allotted lands*, to impose a system of regulations (R. 400, 359, 175-6) concerning the manner and places of logging the timber and the amount of timber to be sold?

2. In the light of the Treaty with the Quinaielts of 1855 (12 Stat. 971), which provides that "roads may be run through said Reservation, on compensation being made for any damage sustained thereby," and of Revised Statutes, Section 2079 (Act of March 3, 1871; 16 Stat. 566; 25 U.S.C. §71), providing that no Indian treaty made prior to 1871 shall be invalidated

or impaired, and of the Fifth Amendment providing for due process of law and that private property shall not be taken for a public use without just compensation, and of Section 8 of the Act of June 25, 1910 (36 Stat. 855, 857; 25 U.S.C. §406), authorizing the Secretary of the Interior to "consent" to a sale by the Indian allottee, and to make "regulations" concerning the payment of the proceeds of the sale, does the Secretary of the Interior have the power to impose, on the logging of Indian timber on allotted lands in the Quinaielt Reservation, Section 10 of the General Forest Regulations of 1920 (R. 403), providing for the reservation, for scenic, aesthetic, and recreational reasons, of a strip of land on each side of roads, trails and streams, as amended by Regulation 22 of the General Forest Regulations of 1936 (R. 380, 381), reserving a quarter of a mile of timber on each side of the road, which in an amendment to the 1936 Regulations was fixed at two hundred feet on each side of the highway (R. 176), thus in effect enlarging and widening the extensive roads through the Reservation and dedicating timber lands along roads, trails and streams, to public use for scenic and recreational purposes and confiscating them for such purposes, without providing for compensation?

3. In the light of the Treaty with the Quinaielts of 1855 (12 Stat. 971) which provides in Article 10 that

> "the United States further agrees * * * the expenses * * * of employes * * to be defrayed by

> the United States, and not deducted from their annuities,"

and of Revised Statutes, Section 2079 (Act of March 3, 1871; 16 Stat. 566; 25 U.S.C. §71), providing that no Indian treaty made prior to 1871 shall be invalidated or impaired, and of Section 8 of the Act of June 25, 1910 (36 Stat. 855, 857; 25U.S.C. §406), authorizing the Secretary of the Interior to "consent" to a sale by an Indian allottee, and to make "regulations" concerning the payment of the proceeds of the sale, and of the Act of February 14, 1920 (41 Stat. 415; 25 U.S.C. §413), authorizing the Secretary with respect to the sale of timber on allotted Indian lands to make "regulations" charging "a reasonable fee for the work incident to the *sale*," does the Secretary of the Interior have the power to impose upon logging operations of allotted Indian lands in the Quinaielt Reservation, Regulation 50 of the General Forest Regulations of 1920 (R. 413, 414), charging the Indians an amount of 10% from the gross proceeds of sale, to cover the Government's expenses, through the Indian Agency, of examining, advertising, marking, scaling and protecting the timber, and supervising the sale, as amplified by Regulation Number 19 of the General Forest Regulations of 1936 (R. 376), fixing the amount of compensation to the Government, for said purposes, at 8% of the gross amount received for the timber sold under regular supervision (R. 377)?

These are the sole questions presented in this petition for certiorari.

B.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The decision of the Circuit Court of Appeals conflicts with *United States v. Algoma Lumber Company*, 305 U. S. 415, wherein it is held that timber sales on allotted lands are contracts between the Indian allottees and the purchasers, to which the Government is not a party. "The contracts authorized were to be those of the Indians and not of the United States" (305 U.S. 415, 422, 423). Hence it follows that the Secretary could not add regulations to the contract at the time of giving his consent, or thereafter (as in the case of the 1936 regulations). He was not a party to the contract, but is merely given supervisory power. He could give his consent, or he could refuse to consent to the contract between the actually contracting parties. His consent or refusal had to be absolute. A consent circumscribed with a system of regulations could not adversely affect the contracts. Unless the two actually contracting parties, namely, the Indian allottee and the purchaser, accepted the regulations, the Secretary could not lawfully impose them. The Indians have not legally consented. If he gave his consent to the sale, which was the extent of his authority under the statute (Section 8 of the Act of June 25, 1910, 36 Stat. 855, 857, 25 U.S.C. §406), the consent was effective, but the regulations sought to be added were nugatory.

The decision of the Circuit Court of Appeals also conflicts with *United States v. Shoshone Tribe*, 304 U.S. 111, 116-117, holding that the Indians are the

substantial owners of reservation lands, and not the United States, and with *Chippewa Indians v. United States*, 301 U.S. 358, 375-6, holding the power of the government to manage Indian lands "is subject to constitutional limitations and does not enable the government * * * to deal with them as its own." While the government as to its own lands can dedicate to public use for scenic and recreational purposes large timber lands along roads, trails, and streams, it is submitted that it cannot do so as to Indian lands without providing for just compensation.

2. The Circuit Court of Appeals for the Ninth Circuit has decided important questions of federal law which have not been but should be settled by this Court. The decision affects many thousands of Indians holding allotted timber lands in large areas of the United States. The decision affects millions of dollars worth of timber and the power of sale of the Indians with respect thereto expressly conferred by Congress.

The Quinaielt Treaty of 1855 (12 Stat. 971) in Article VI authorized the President to assign lots to individuals or families "on the same terms and subject to the same regulations as are provided in the Sixth Article of the treaty with the Omahas so far as it may be applicable." The Sixth Article of the Treaty with the Omahas (10 Stat. 1043, 1044) authorized the President to make allotments for *permanent homes*, and, *in such case only*, may impose the condition that the land shall not be aliened. But "these [Quinaielt] Indians are not the usual reservation Indians. They were never placed on the reservation *or required to*

live within its limits." *Halbert v. United States*, 283 U.S. 753, 761. Only a very few of the many allottees actually live on the reservation, and their lands and the timber thereon are, therefore, not subject to restraints on alienation, so far as the treaty is concerned, and they own their lands and the timber thereon with ordinary powers of disposition, free of restraints as far as 25 U.S.C. § 406 is concerned, and hence free of consent or regulations.

In any event, the effect of the decision of the Circuit Court of Appeals is in substance to deny to these Indians a power to sell timber, which includes the power to fix the terms and conditions of sale, expressly conferred on them by Congress; the Circuit Court decision grants to the Secretary of the Interior powers to make regulations not conferred, and not intended to be conferred, by Congress.

The Circuit Court of Appeals expressly holds that the words in Section 406 (Section 8 of the Act of June 25, 1910; 36 Stat. 855, 857, 25 U.S.C. 406) as follows:

> "The timber on any Indian allotment, held under a trust or other patent containing restrictions of alienation, may be sold *by the allottee* with the *consent* of the Secretary of the Interior, and the proceeds thereof shall be paid to the allottee or disposed of for his benefit *under regulations* to be prescribed by the Secretary of the Interior." (Italics ours)

notwithstanding the careful choice of words by Congress, differentiating between "regulations" and "consent," mean the same as the words in the adjoining

Section 407 (Section 7 of the same act; 25 U.S.C. 407) as follows:

> "The mature living and dead and down timber on unallotted lands of any Indian reservation may be sold *under regulations* to be prescribed by the Secretary of the Interior * * *" (Italics ours)

Congress clearly intended that timber on unallotted lands of any Indian reservation might be sold under regulations to be prescribed by the Secretary of the Interior; but that timber on any Indian allotment may be sold *by the allottee* with the *consent* of the Secretary of the Interior, and the proceeds thereof paid to the allottee *under regulations* to be prescribed by the Secretary of the Interior. Rather startlingly the Circuit Court says (R. 1046; 118 F. (2d) 421, 424): "We think it is without significance that Section 7 authorizes regulations governing the sale whereas Section 8 speaks of consent," thus denying the plain meaning of the words used by Congress in successive sections of the same statute.

As to timber on allotted lands it was clearly the intent of Congress that it could be sold *by the allottee*, on such terms as the allottee might prescribe, but that the sale on the terms and conditions fixed by the allottee, would have to be submitted for the consent or rejection of the Secretary.

Congress intended that as to timber on allotted lands the allottee should have the full power to sell and specify the terms of sale, and that the Secretary should have the power of consent or refusal, but it did not give him the power to give his consent and

at the same time, or thereafter, make regulations concerning the sale, as in the case of unallotted lands.

Prior to the Act of June 25, 1910 (36 Stat. 855, 857, 25 U.S.C. §§ 407, 406) the sale of an Indian allotment was governed by the Act of March 1, 1907 (34 Stat. 1018; 25 U.S.C. § 405) and had to be "on such terms and conditions and under such rules and regulations as the Secretary of the Interior may prescribe." The Act of June 25, 1910 (36 Stat. 855) was an elaborate act relating to Indians and was intended to enlarge their rights (See *Eastman v. U. S.*, 31 F. Supp. 754, 760-1). It for the first time dealt specifically with the sale of *timber* on allotted and unallotted Indian lands. With respect to timber on unallotted Indian lands the act provided (36 Stat. 857, 25 U.S.C. 407) that it might be sold "under *regulations* to be prescribed by the Secretary of the Interior." With respect to timber on allotted lands the act provided that such timber "may be sold by the *allottee* with the *consent* of the Secretary of the Interior, and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under *regulations* to be prescribed by the Secretary of the Interior" (Italics ours). The Circuit Court of Appeals says that all this means the same thing; that "consent" means "regulations," and that "regulations" means "consent," although Congress used the words in adjoining sections carefully and advisedly in their ordinary meaning. This, we respectfully submit, is an egregious error, adversely affecting vast numbers of Indians and large areas of Indian lands, and warrants correction by this Court.

Moreover, as to the regulation setting aside, for aesthetic and recreational purposes, 200 feet of timber on each side of roads, trails, and streams, for many miles in the Reservation, the Secretary, in substance and in fact, has enlarged and widened the extensive road areas throughout the Quinaielt Reservation, without providing compensation therefor, in what seems a manifest violation of the Quinaielt Treaty of 1855 and of the Fifth Amendment, a result that Congress clearly never intended or authorized, and which amounts to a taking of Indian property. *U. S. v. Klamath Indians*, 304 U.S. 119, 123; *Chippewa Indians v. U. S.*, 301 U.S. 358, 375-6; *Portmouth Co. v. U. S.*, 260 U.S. 327 (where government acts were held to amount to a taking).

Again as to the regulation charging the Indian allottee 8% of the gross proceeds of the sale of the timber, the Quinaielt Treaty seems clearly to contemplate that the Government will bear the entire expense of Government employees and therefore the Act of February 14, 1920 (41 Stat. 415, 25 U.S.C. § 413) should, under settled rules of construction be applied only to situations where there is no applicable treaty provision, which Congress has clearly indicated its intention not to violate.

3. The decision of the Circuit Court of Appeals involves the treaty rights and statutory rights of Indians, which this Court has constantly said should be liberally construed (*U. S. v. Payne*, 264 U.S. 446, 448-9, and cases cited) and as to treaty rights particularly, should be construed with "enlarged rules of construction" and "in the sense in which they would naturally

be understood by the Indians," all doubts being resolved in their favor. *Jones v. Meehan*, 175 U.S. 1, 11; *Choate v. Trapp*, 224 U.S. 665, 675; *U. S. v. Shoshone Tribe*, 304 U.S. 111, 116.

This cause relates to the valuable rights of Indians, who are wards of the Government. This Court, recognizing the peculiar position of the Indian in this country, has been most solicitous that his rights be not denied except upon the judgment of the highest court in the land. Consequently this Court has often and recently granted certiorari in cases affecting the rights of Indians, *e.g.*:

Klamath & Modoc Tribes v. U. S., 296 U.S. 244;
Cate v. Beasley, 299 U.S. 30;
British American Oil Co. v. Board, 299 U.S. 159;
Shoshone Tribe v. U. S., 299 U.S. 476;
U. S. v. Seminole Nation, 299 U.S. 417;
U. S. v. McGowan, 302 U.S. 535;
Creek Nation v. U. S., 302 U.S. 620;
U. S. v. Shoshone Tribe, 304 U.S. 111;
Minnesota v. U. S., 305 U.S. 382;
U. S. v. Algoma Lumber Co., 305 U.S. 415;
U. S. v. Powers, 305 U.S. 527;
U. S. v. United States Fidelity & G. Co., 309 U.S. 506.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this Court, for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled in its Docket No. 9558, *United States of America, et al., Appellants, v. Harvey Eastman, et al., Appellees*; and that the said decree of the said United States Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court; and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

Signed:

HARVEY EASTMAN
CHARLES STROM
OSCAR MCLEOD
ALFRED EDWARD BECKEN
LAYTON HENRY WILLIAMS
JAMES JACKSON, *et al.*,

By W. A. ACKERMAN,
OTTO B. RUPP,
ALFRED J. SCHWEPPE,
Counsel for Petitioners.